WONG CHEONG KONG SDN BHD

v.

PRUDENTIAL ASSURANCE SDN BHD

HIGH COURT MALAYA, PULAU PINANG
VINCENT NG J
[SUIT NO: 23-30 OF 1987]
8 JULY 1997

INSURANCE: *Allegation of fraud - Ingredients of - Exaggerated or inflated claim - Whether constitutes fraud on insurers - Whether relieves insurers of liability - Burden and standard of proof*

INSURANCE: *Fire insurance - Proof of loss - Date for ascertaining amount of loss - Date of loss*

INSURANCE: *Fire insurance - General principles - Whether a policy of indemnity - Obligation of insurer - Amount recoverable - Sum insured - Actual loss*

INSURANCE: *Claims - Interest on damages - Whether insurance policies bear interest - Discretion of court - Civil Law Act 1956, s. 11*

The plaintiff, a shampoo manufacturer, suffered loss, when a fire destroyed a portion of its building, furniture, electrical installations, plant and machinery, stock and other goods – all of which were covered under a fire insurance policy ('the policy') with the defendant. The policy was issued by the defendant by virtue of a policy transfer endorsement, which was effected following the take-over of all the interests of a company by the plaintiff. The defendant had avoided the plaintiff's claim upon the allegation of fraud and contended that the plaintiff had submitted a fraudulent claim on account of two invoices for unpurchased goods and a false statement on the value of stocks which was inflated. The plaintiff instituted an action against the defendant for damages arising from loss of plant and machinery and stocks. The court had to decide: (i) whether the plaintiff's claim was fraudulent; and (ii) if the claim was not fraudulent, what quantum of damages was the plaintiff entitled to.

Held:

[1] A statement made by an insured is fraudulent, if he knows it to be false and makes it, in order that the insurers may act on it. Mere exaggeration is **not** conclusive evidence of fraud, although such exaggeration may amount to fraud if it is dishonestly made or so greatly in excess of the

true amount as to be incompatible with good faith. In the instant case, as the particulars of fraud alleged by the defendant constituted criminal fraud, the burden of proof would be beyond reasonable doubt.

[1a] The two invoices submitted by the plaintiff in support of its claim for stocks which were destroyed in the fire were not fraudulent. The goods as stated in the invoices were purchased and paid for and, under the circumstances, it was highly probable that the goods were together with the rest of the stock in the premises when the fire occurred.

[2] An exaggerated claim will **not** relieve the insurer of liability, unless the claim can be shown to be fraudulent. An inflated claim will be considered fraudulent only if it is clear upon the criminal burden of proof beyond reasonable doubt, that the assured intended to defraud the insurers, or that the over-estimation of loss is so serious as to lead to the inference that the assured must have intended to defraud them.

[2a] There was no evidence that the claims were grossly or substantially exaggerated, or that they were submitted for the purpose of defrauding the defendant. The defendant had failed to discharge its burden of showing that the plaintiff had submitted a fraudulent claim or declaration, such as would entail forfeiture of benefit or avoidance of the policy. Further, it was found that the plaintiff had shown no intention to defraud the defendant.

[3] It is trite law that the relevant date for ascertainment of the amount of loss in a fire insurance claim is the date of loss. In insurance law, a fire policy is an indemnity policy, that is, a policy which obligates the insurer only to make good the actual losses suffered by the insured, which is in fact proved. The insured cannot recover more than the sum insured. Even within the limit, he cannot recover more than what he establishes to be the actual amount of his loss.

[3a] It is for the insurers to elect within a reasonable time, whether to reinstate or to opt for payment in money. In the instant case, the defendant in failing to respond or to exercise its option during the vital period of claim, had shown that it had no intention to reinstate the damaged property. The basis for quantifying the instant case would be on an indemnity basis as agreed by the parties.

[4] The loss recoverable for plant and machinery destroyed would not be based on the replacement value of a similar property at the time of the fire. In respect of the damaged items that could be repaired, the loss would be the reasonable cost of the repairs and **not** the market value.

[4a] The electrical lighting and fittings were insured under "electrical equipment and all other contents", and the defendant had itself issued the endorsement after prior and proper verification of the property. Consequently, even if there was any ambiguity in the endorsement, the *contra proferantum* rule would apply against the defendant.

[5] Pursuant to s. 11 of the Civil Law Act 1956 ('the Act') the courts are empowered to award interest on debts and damages. A policy does not bear interest, and it is only awarded if the court thinks fit, as damages for the wrongful detention of money, which ought to have been paid. In the exercise of its discretion under s. 11 of the Act, the court would consider the conduct of the defendant.

[5a] In the instant case, the conduct of the defendant had been cynical and not to its credit and in justice, an interest of 8% on the judgment sum from the date of loss until payment would be awarded.

[Judgment to plaintiff; defendant to pay costs.]

Cases referred to:

Abdool Hoosein v. Turner LR 14 IA 111 ***(cit)***
Alchemy Ltd v. Vulcan Boiler and General Insurance Co Ltd [1966] 1 Llyod's Rep 354 ***(cit)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1995] 4 CLJ 45 ***(cit)***
Burt and Harvey Ltd and Alchemy Ltd v. Vulcan Boiler and General Insurance Co Ltd [1966] 1 Lloyd's Rep 354 ***(cit)***
Castellain v. Preston [1883] 11 QBD 380 ***(cit)***
Chu Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34 ***(cit)***
Crossley v. City of Glasgow Life Assurance Co [1876] 4 Ch D 421 ***(cit)***
Curtis & Sons v. Mathew [1918] 35 TLR 189 ***(cit)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 CLJ 257 ***(cit)***
Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1988] 1 CLJ 734 ***(cit)***
Elcock v. Thomson [1949] 2 KB 755 ***(cit)***
Forney v. Dominion Insurance Co Ltd [1969] Llyod's Rep 502 ***(cit)***
Leppard v. Excess Insurance Co Ltd [1979] 1 WLR 512 ***(refd)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 ***(cit)***
Macbeth & Co Ltd v. Maritime Insurance Co Ltd [1908] 24 TLR 559 ***(cit)***
Meacock v. Bryant & Co [1942] 2 All ER 661 ***(cit)***
Montreal Assurance Co v. M'Gillivray [1857] 2 LCJ 221 ***(cit)***
Re Waterhouse's Policy [1937] Ch 415 ***(cit)***
Richard Aubrey Film Productions Ltd v. Graham [1960] 2 Llyod's Rep 101 ***(cit)***
Saminathan v. Pappa [1981] 1 MLJ 121 ***(cit)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183 ***(cit)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 ***(cit)***
Webster v. British Empire Mutual Life Assurance Co [1880] 15 Ch D 169 ***(refd)***
West Wake Price & Co v. Ching [1956] 3 All ER 821 ***(cit)***
Yorkshire Provident Life Assurance Co v. Gilbert & Rivington [1895] 2 QB 148 ***(cit)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 17
Evidence Act 1950, s. 73A(2), (6)

Other sources referred to:
Halsbury's Laws Of England, 4th edn reissue, vol 25, p 352
The Law of Insurance, Raoul Colinvaux, 5th encl, p 167

For the plaintiff - Khoo Eng Chin; M/s Khoo & Sidhu
For the defendants - Chin Yew Meng; M/s Allen & Gledhill

Reported by Michele Saw

JUDGMENT

Vincent Ng J:

The plaintiff company (plaintiffs) was a manufacturer of shampoo and other hair cosmetics on 11 September 1985, when a fire occurred on an unfortunate evening in their double-storey building at Plot 9, Bayan Lepas Non Free Trade Zone, Penang (the risk premises), which damaged and/or destroyed the front portion of the building, furniture, electrical installations, plant and machinery, stock and other goods.

The plaintiffs instituted this claim against the defendant company (defendants) based on a Fire Policy No. FA 552817-M dated 5 October 1984 (exh P1) (hereinafter referred to as "the policy") that was issued to the plaintiffs by the defendants by virtue of a policy transfer endorsement No. FA/25363/85 dated 18 January 1985, to cover the period from 1 October 1984 to 1 October 1985, against loss or damage by fire. The said policy transfer endorsement was effected following the take-over of all the interests of M/s Wong Wah Seng Trading Company Sdn. Bhd. (M/s Wong Wah Seng) by the plaintiffs.

It was common ground that: the fire was fortuitous; it occurred during the currency of and when the policy was in force; the fire was duly reported to the defendants on or about 12 September 1985 (vide statement of agreed facts dated 10 January 1996); the plaintiffs submitted their claim to the defendants' adjusters on or about 23 October 1985 and re-submitted same on or about 24 April 1986 (vide statement of agreed facts dated 10 January 1996). And, that the quantum of insurance cover was governed by an Endorsement No. FA/

26267/85, wherein it was declared and agreed that with effect from 23 May 1985, the schedule of the policy was revised as follows:

1) On building (ie, risk premises) (including furniture, fixtures, fittings, electrical installations and air-conditioning) constructed of brick and/or concrete and roofed with corrugated and/or sprandex sheets occupied and known as "Wong Wah Seng Trading Co. Sdn. Bhd." as Contract Manufacturers of Cosmetics products and Toiletries for Messrs. Wong Cheong Kong Sdn. Bhd. and Anka Tackle Corp. Sdn. Bhd. as Tenant – the sum of M$500,000.

2) On plant and machinery, electrical equipment, tools, moulds, office machine and all other contents – the sum of M$700,000.

3) On stock of raw materials, work in progress and finished products including packing materials whilst stored in or around the building insured under item (1) above – the sum of M680,000.

4) On cost of Removal of Debris – the sum of M40,000.

5) On loss of Rental for 18 months – the sum of M306,000.

This case has been part heard for four days before another judge on 9 May 1991, 10 May 1991, 20 August 1991 and 25 September 1991, with as many as 42 exhibits already tendered then, but upon the application of the defendants it was heard *de novo* before me. The plaintiffs' bundle of documents was marked 'PBD', the defendants' bundle, 'DBD', the statement of agreed fact, 'SAF' and the agreed issues 'AI'.

The sole witness for the plaintiffs was its managing director Mr. Wong Cheong Kong who gave evidence as PW1. And, on behalf of the defendants, evidence was led from three witnesses namely their senior manager in charge of non-life insurance, Mr. William Ho Yew Fatt (as witness DW1), two insurance loss adjusters who were with M/s Thomas Howell Kiewit at the material time of the fire, Mr Choong Kian Leong (as witness DW2) and Mr. Maniam a/l Ratanam (as witness DW3). It is I think unnecessary for this court to go into the evidence of all the witnesses in greater detail than is necessary, as the material portions of the testimony of such witnesses that pertain to my deliberations is hereafter set out and discussed.

The defendants raised several issues in their amended statement of defence, but have abandoned or withdrawn the following hopeless or near hopeless issues at the trial:

(a) Whether the plaintiffs are entitled to solely pursue this claim (vide para 2 of amended statement of defence). This issue was abandoned by the defendants at the hearing on 10 January 1996;

(b) Whether the plaintiffs were in breach of Licence Warranty 9(a) of the Policy (vide para 17 of amended statement of defence). This issue was abandoned by the defendants on 1 February 1996;

(c) Whether the plaintiffs had an insurable interest in the policy (vide para 4 of amended statement of defence). It is apparent from the defendants' written submission that they have also abandoned this issue;

(d) The defendants have also withdrawn the allegations made in para 11(j) and (k) of the amended statement of defence, during 3 July 1996 hearing.

And so, the action has been pared down to essentially two issues: first (on liability), whether the plaintiffs' claim is fraudulent on account of the two disputed invoices and also on account of a false statement by virtue of the claim being inflated; and second (on quantum), if the claim is not fraudulent, what quantum loss is the plaintiffs entitled to ?.

In regard to the question of liability, it is necessary to first discuss the law on fraud before I consider and decide on the two alleged commissions of fraud pertaining to the two disputed invoices and the false statement inflating the claim.

The Law On Fraud

The law on fraud as applicable to insurance claims is lucidly and aptly stated by Raoul Colinvaux in *'The Law of Insurance'* (5th encl at p. 167) thus:

> One of the consequences of the principle that a contract of insurance is one of the utmost good faith, (see *Heyman v. Darwins* [1942] AC 356, 365) is that fraudulent claims made under it give the insurers the right to avoid (see *Stebbing's Case* [1917] 2 KB 433, 438) the whole policy. Thus, if the assured makes a fraudulent claim he cannot recover at all (See *Norton v. Royal* [1885] 1 TLR 460), and conditions in the policy to this effect (see *Jureidini v. National British* [1915] AC 499) are declaratory of the legal position without them.
>
> A statement made by the assured is fraudulent if he knows it to be false and makes it in order that the insurers may act upon it. The most common examples are claims made by an assured who has himself destroyed the property insured, or grossly exaggerated claims. Mere exaggeration, however, is not conclusive evidence of fraud, (see *London Assurance v. Clare* [1937] 57 L1LR 254, 268)

for value is often a matter of opinion, though such exaggeration will amount to fraud if it is dishonestly made, or so greatly in excess of the true amount as to be incompatible with good faith (see *Chapman v. Pole* [1870] 22 LT 306).

Fraud entitles the insurers to avoid the whole policy, and not merely repudiate liability on it. The burden of proving fraud is on the party who alleges fraud and in cases of criminal fraud he is required to prove it beyond reasonable doubt. See: *Saminathan v. Pappa* [1981] 1 MLJ 121; *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81 and *Boonsom Boonyanit @ Sun Yok Eng v. Adorna Properties Sdn. Bhd.* [1995] 4 CLJ 45. In my deliberation in Boonsom Boonyanit, the crucial hypothetical question that I had to ask myself was: whether sitting in a Criminal Court, I could conclude that evidence such as the evidence then before me, if adduced by the prosecution in a case of forgery, was such as would be sufficient, upon the criminal burden of proof, to bring home a conviction of forgery. Therein, I had found and held that the sum total of the evidence – on *alibi* (tendered by the plaintiff therein who alleged forgery) even when coupled with testimony of the plaintiff's son that the signature concerned was not that of his mother, but devoid of any handwriting evidence on the forensic aspect or character of the signature itself – was such as would be incontrovertibly insufficient for a court in a criminal case to consign an accused to prison. Thus, even though in that case, I had found that the plaintiff had succeeded in proving her case of forgery on the balance of probability, it was not sufficient to discharge the criminal burden that rested on her shoulders.

The various shades of fraud set out in (a) to (e) of s. 17 of the Contracts Act 1950 – with illustrations (a) to (d) – would indicate that fraud in certain situations could be purely civil in nature, as the impugned act involved only obliguity in conduct or, what has been losely termed as 'sharp practice'. The vital question to ask is whether the fraud complained of amounted to a criminal offence. Thus, the nature of fraud could be either civil or criminal in any civil proceedings.

Where the particulars of fraud in civil proceedings disclose fraud of the criminal kind, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. But, where the fraud alleged is purely civil in nature or is entirely founded on a civil fraud, and not based on a criminal conduct or offence, the civil burden of proof would apply. (See *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1986] 1 MLJ 105, *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34, *Eastern & Oriental Hotel (1951) Sdn. Bhd. v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35, *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn. Bhd.* [1993] 1 AMR 16:612 @ p. 620 line 27; [1993] 1

MLJ 182, *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371 and *Saminathan v. Pappa (supra)*). In the present case, parties are *ad idem* that the particulars of fraud alleged by the defendants constituted criminal fraud and that the criminal burden of proof is applicable.

The court is only bound to decide the charge of fraud solely upon the allegations pleaded under 'Particulars of Fraud'; in the instant case, in paras. 11 to 16 of the amended statement of defence. See *M. Ratnavale v. S. Lourdenadin (supra)*. The effect of such particulars is that the issues of fraud to be tried by the court are circumscribed by the particulars. See *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington* [1895] 2 QB 148 *Abdool Hoosein v. Turner* LR 14 IA 111.

As regards the degree and nature of proof required in a case involving allegations of criminal fraud, the Supreme Court in *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ p. 34, at p. 38, had this to say:

> We agree that fraud **whether made in civil or criminal proceedings must be proved beyond reasonable doubt** and cannot be based on suspicion or conjectures (*Narayanan v. Official Assignee Rangoon Air* [1941] PC 93 *Saminathan v. Pappa* [1981] 1 MLJ 121) proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty **but it must carry a high degree of probability.** What it means is that the evidence adduced is such that the Court believes its existence or a prudent man considers its existence probable in the cirsumstances of the particular case.

The Facts

The linchpin of the defendants' avoidance of the whole policy upon their allegation of fraud, is found in condition 13 of the policy, which reads:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in the case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.

The defendants relied on the first limb of condition 13 of the conditions of the policy in resisting the plaintiffs' claim by alleging that the plaintiffs had submitted a fraudulent claim, by their inclusion therein of two invoices, both

dated 25 February 1985, from M/s Gulf Forwarding Services Pte Ltd, Singapore, bearing the total sum of RM142,681.35 (the two disputed Gulf Invoices) when the goods covered by the invoices were neither purchased by the plaintiffs nor M/s Wong Wah Seng. And also, that PW1 had given a false declaration by inflating the value of stock purchased from M/s Wong Wah Seng, and declaring that the plant and machinery as well as stocks had been paid for, when that was not the case.

As the issues of fraud to be tried by a judge are circumscribed by and decided solely upon the particulars of fraud pleaded, I shall here set out such particulars verbatim as pleaded:

Particulars of Fraud

(a) The Plaintiffs submitted 2 invoices both dated 25th February 1985 amounting to M$46,434.60 and M$96,246.75 in respect of goods allegedly purchased from Gulf Forwarding Services Pte Ltd, Singapore, when that company had not sold any goods to the Plaintiffs or to Wong Wah Seng Trading Co. Sdn. Bhd., nor had Wong Wah Seng Trading Co Sdn. Bhd. sold the goods to the Plaintiffs;

(b) The purported invoices were not in fact invoices of the said company but were so made up to appear as invoices;

(c) The Plaintiffs and Wong Wah Seng Trading Co Sdn. Bhd. were in no position to show proof of payment having been made to Gulf Forwarding Services Pte Ltd., Singapore;

(d) The Plaintiffs and Wong Wah Seng Trading Co. Sdn. Bhd. by not having effected the purchases covered by the purported invoices had reflected them in their computer print out and had given the Defendants a copy of such computer print in respect of the 2 said invoices;

(e) The 2 said invoices were also recorded in the record books of another company known as Wong Wah Seng Trading Co Sdn. Bhd.;

(f) The contents of the 2 said invoices and the other documents, in particular, the 2 without prejudice particularization of claim both dated 16th April 1986 were in fact made out from the same typewriter;

(g) Wong Cheong Kong, the Chairman of the Plaintiff company allegedly sold goods on 21st December 1984 totalling $134,436.20 to Wong Wah Seng Trading Co Sdn. Bhd. which said company is also owned by Wong Cheong Kong, the Chairman of the Plaintiff company. Wong Wah Seng Trading Co. Sdn. Bhd. subsequently allegedly sold the purported goods to the Plaintiffs on 15th August 1985;

(h) Arising out of the particulars given in (g) above, the Plaintiffs could not provide proof that the purchase price had been paid;

(i) The said invoices totalling $134,436.20 were brought about to inflate the claim;

(j) The typewritten print appearing in the 2 invoices submitted by Wong Cheong Kong were made from the same typewriter which was utilized to type out the other invoices;

(k) The dates on the said invoices issued by Wong Cheong Kong are shown to have been typed out by another typewriter showing different dates to give apparent credence to the purported sales;

(l) In respect of a sum of $669,161.05 in relation to alleged loss or damage to goods, the Defendants aver that the claim in respect of the figure is not genuine as it relates to a colourable sale allegedly effected with Wong Wah Seng Trading Co. Sdn. Bhd., which said company, Wong Cheong Kong, the Chairman of the Plaintiff company at the material time had a controlling interest;

(m) The inflated value of stocks allegedly purchased by the Plaintiffs from Wong Wah Seng Trading Co. Sdn. Bhd. were purchases created as such between the Plaintiffs and Wong Wah Seng Trading Co. Sdn. Bhd. through the instrumentality of Wong Cheong Kong who at all material times was a shareholder director of the Plaintiffs and Wong Wah Seng Trading Co. Bhd. The generating of such sales and purchases as aforesaid and the submission of the claim by the Plaintiffs for stocks as claimed in this action constituted evidence of the submission of a fraudulent claim; and

(n) The submission of all the items of claim in this action by the Plaintiffs on an inflated basis and supported by certain false documents is evidence of the submission of a fraudulent claim.

Clearly, with regard to the two disputed Gulf invoices, the question for this Court to decide is: whether the goods covered by those two invoices were actually purchased and paid for by M/s Wong Wah Seng and subsequently transferred to the plaintiffs; and, were those goods also in the risk premises when the fire occurred on 11 September 1985. This is a question of fact to be determined from the evidence adduced at the trial. To enable them to prove fraud against the plaintiffs on account of the two disputed Gulf Forwarding invoices, the defendants initiated, through an order of this Court dated 13 September 1990, the formal recording of evidence pertaining thereto on 27 March 1991 by the Singapore High Court from one named Tan Chok Liang, the managing director of M/s Gulf Forwarding Services Pte Ltd., Singapore. The recorded notes of evidence from the Singapore High Court was tendered by the Defendants and marked as exh D42.

It is pertinent to note the plaintiffs never claimed that they or M/s Wong Wah Seng had purchased the goods covered in the two disputed Gulf invoices from Gulf Forwarding Services Pte Ltd, Singapore (M/s Gulf Forwarding). What was in fact pleaded in para. 5.2 of the plaintiffs' reply to amended statement of defence was that M/s Wong Wah Seng had purchased those goods from one Mr. Roland Oh, who had held out to M/s Wong Wah Seng that he was a shareholder of M/s Gulf Forwarding and that he had authority to sell those goods to M/s Wong Wah Seng. PW1, in his evidence also said he told the defendants' adjusters that he had purchased the goods covered by the two disputed Gulf invoices from one Mr Roland Oh who had then claimed to be acting for M/s Gulf Forwarding of Singapore. PW1 further added that he knew and dealt with Roland Oh and not M/s Gulf Forwarding. There is evidence that M/s Wong Wah Seng had previously purchased other goods (not covered by the two disputed Gulf invoices) from Mr Roland Oh, who had also used invoices from M/s Gulf Forwarding, and those other M/s Gulf Forwarding invoices are found in exh 'P31A'. In this regard, this court takes cognisance that the defendants have not challenged the purchase of the other goods covered by those other M/s Gulf Forwarding invoices. From the evidence recorded in D42, Tan Chok Liang, the Managing Director of M/s Gulf Forwarding had said that Roland Oh was his "old friend" and that he could recognise the signatures on the two disputed Gulf invoices to be that of Roland Oh. What he said could not have been more categorical than this: "I recognise the signature. It belongs to Roland Oh. He is an old friend of mine" (See: A14 (a) in p. 8 of 'D42'). Not only that, he did also allow Roland Oh to use M/s Gulf Forwarding stationery/letterhead – as he further went on to say: "I gave him the old letterheads. I saw no harm in giving ..." (See: Q. & A. 27 in p. 11 of '42'). But more importantly, he said he knew of and subsequently discovered the purposes for which Roland Oh had wanted to use those letterheads. (See: the last Q. & A. in pp. 12 and 13 of 'D42'). After having carefully studied the evidence recorded, I find that the net effect of the contents of exh D42 did not bear out but indeed, militated and ran slap against the defendants' charges of fraud on this score.

Evidence was given by PW1 at the trial as to how he purchased those goods from Roland Oh and how he paid for them (See: Exhs 'P33' to 'P39'). There is also evidence that the goods covered by the two disputed Gulf invoices are reflected in the computer print-out as at 15 August 1985 – 'P28'. Consequently, I find that the goods covered by the two disputed Gulf invoices were actually purchased and paid for by M/s Wong Wah Seng and subsequently transferred to the plaintiffs; and hence, it is highly improbable that those goods were not also together with the rest of the plaintiffs' stock in the risk premises when the fire occurred.

The Law On Exaggerated Claims

An exaggerated claim will not relieve the insurer of liability unless the claim can be shown to be fraudulent. An inflated claim will be considered fraudulent only if it is clear, upon the criminal burden of proof beyond reasonable doubt, that the assured had intended to defraud the insurers or that the over-estimation of loss is so serious as to lead to the inference that the assured must have intended to defraud them. Whether a claim was put in with the intention of defrauding the insurance company is largely a question of fact to be inferred from the surrounding circumstances, which must point towards such intention to defraud; bearing also in mind that the assured may honestly over estimate his loss and that sometimes this may be due to mistake.

The Facts

The defendants' second contention was that the claim on the plant and machinery as well as stocks were highly inflated, and that they were not paid for. This contention stems from the fact that sometime on or about 15 August 1985, before the fire, the machinery and stock were transferred from M/s Wong Wah Seng Trading Company Sdn. Bhd. to the plaintiffs, following a similar transfer of the risk premises from the former to the latter company vide an agreement dated 11 May 1984. It was asserted that the plant and machinery had been sold by M/s Wong Wah Seng to the plaintiffs for the original invoiced-value of RM567,536 without taking into account the rate of depreciation of 5% to 10% per annum during the period of their use by M/s Wong Wah Seng, when both companies had common directors and shareholders, so that (according to counsel Mr Chin), "the opportunity to submit inflated claims should such an opportunity were to arise would be open to the plaintiffs as has been done in this instance." Similary, the defendants also took issue on the value of M/s Wong Wah Seng's stocks sold to the plaintiffs on 15 August 1985 for RM669,161.05.

Besides my inevitable observation that this second contention, quite incredibly, attributes the faculty of pre-fire clairvoyance to PW1, the submission is untenable and without any merit for the following reasons:

1) When PW1 applied for increased coverage for plant machinery and stock on 23 May 1985 one Mr John Ng of BBT Sdn. Bhd (the authorised agent of the defendants) visited the risk premises, duly carried out inspections and investigations, and only then approved the increased coverage. This part of PW1's evidence remain unchallenged as Mr John Ng was not called by the Defence to give evidence.

2) PW1 was never pointedly challenged in cross-examination that he had inflated the value of the stocks purchased from M/s Wong Wah Seng. It was only put to PW1 by Mr Chin that all the assets in M/s Wong Wah Seng could have been sold to the plaintiff company at book value. To which, the sensible answer from PW1 was that as the purchaser company and vendor company were two different legal entities it was up to the two parties to agree on the sale and purchase value of the assets.

3) In any event, the various progressive transactions effected in the sale of M/s Wong Wah Seng's assets to the plaintiffs all predate the fire. Indeed, quite earlier on, in respect of the sale of the landed property with the risk premises thereon (registered on 7/2/85 – vide Exh. P7) pursuant to a written agreement dated 11/5/84 entered into between the two limited companies, and followed thereafter by the sale of stock plant and machinery as per invoices dated 15 August 1985 (as reflected also by contemporaneous documents). It would thus be preposterous for the defendants to contend that the said assets covered by the invoices dated 15 Agust 1985 were not sold or not paid for by the plaintiffs; just as it would be equally absurd to suggest that the assets were intentionally sold at inflated values in expectation of the fire in order to defraud, considering the acknowledged fact that the fire itself was fortuitous.

Credibility Of Witnesses

In my observations while PW1 was on the witness-stand, he struck me as a witness of truth. His testimony was consistent with the contents of documents tendered or referred to. It cannot escape this court's attention that his evidence on the two Gulf invoices was borne out by contents of the evidence recorded in Singapore (vide pp. 11 to 13 of D42). And generally, his credibility is further buttressed by DW2's own admission that none of the documents showed that the plaintiffs had made any claims for loss of rental from M/s Wong Wah Seng – even though para. 16 of the amended statement of defence had averred that the plaintiffs had submitted a claim for RM77,000 on such loss of rental. Furthermore, to be noted, is that certain serious allegations in the particulars of fraud (paras j and k) in the defence regarding the use of the same typewriter, were withdrawn by the defendents, and only after the trial had progressed to its final stage. Similarly, not an iota of evidence was adduced to back up similar serious allegation concerning the use of same typewriter vide para (f) of the particulars. Whereas, DW1 in the course of his testimony had revealed a conduct not untypical of a litigant who when pressured, shifts the blame to his ubiquitous legal advisors. In

cross-examination, while acknowledging that his company repudiated liability and relied on condition 19 of the policy when they wrote a letter dated 20 October 1986 to the plaintiffs (which was just after the one (1) year (from the fire) period stipulated in condition 19), DW1 rebutted thus: "I do not agree that to repudiate liability after one year and then to rely on condition 19 is not good faith, as we have acted on the advice of our solicitors." This witness nevertheless agreed that the specific allegations which form the basis of the defendants' defence of fraud were not in anywhere reflected in the interim or final report of their (own) adjusters. Also, even on their defence of breach of warranty (which was abandoned in the course of the hearing) the final report of the defendants' adjusters dated 30 August 1986 had reported that "we traced no breach of any applicable policy warranty." When confronted with this facet of the report, he had perforce to reveal that the amendment pertaining to breach of warranty "was made on the advice of our solicitors that the adjuster could have omitted to look into certain areas pertaining to the warranty compliance by the insured", and, he concluded: "I agree that we were following our solicitor's advice rather than our adjusters' report." Thus, on the material particulars of this case I find myself unable to believe or accept the testimony, either of DW1 or DW2.

There is no evidential basis proffered by the defendants to enable this court to find that the claims were grossly or substantially exaggerated or that they were submitted for the purpose of defrauding the defendants. And, neither is there any basis to hold that PW1 must have known that the claim or any part thereof were false. In any event, even if the plaintiffs' claim had been exaggerated, (which is not what I have found) it was not, in my view, so exaggerated as to be fraudulent. Even so, concerning exaggerated claims, the practice in business to exaggerate demands in order to accommodate the commercial phenomenon of "price haggling", ought not to be ignored by the court in its deliberation, as it is quite prevalent and hence not necessarily an *ipso facto* fatal element in an insurance claim.

Since the defendants seem rather surefooted in their rejection of the plaintiffs' claim, I have, with an acutely inquiring mind and profuse patience listened for the span of ten days to see if the plaintiffs' claim could on any ground be judiciously refused, but I could find none. In the event, for all the above reasons, I have come to the conclusion that the defendants have utterly failed to discharge their criminal burden of showing that the plaintiffs had submitted a fraudulent claim or declaration, such as would entail forfeiture of benefit or avoidance of the policy under condition 13 of same. Indeed, from a careful study of the evidence from both sides, and having also to consider the contents of exh D42, it is my judgment that neither was such burden discharged by

the defendants on a balance of probabilities (civil burden). Furthermore, I find that no intention to commit fraud on the part of the plaintiffs has been shown.

On Quantum

At the hearing, the following items on quantum of claim have been agreed upon:

(a) on building, furniture and fixtures – RM95,000

(b) on loss of rental from Tenant – RM24,000

(c) on removal of debris – RM20,000

And the items of claim not agreed upon are:

(a) on plant and machinery – where the claim is stated to be RM682,990.53

(b) on stocks – where the claim is stated to be RM661,437.05

It is trite law that the relevant date for ascertainment of the amount of loss in a fire insurance claim is the date of loss. And, the award on such loss would itself necessitate a finding and decision under two seperate headings, namely:

(a) what items of plant, machinery and stock were in the risk premises when the fire occurred; with those destroyed and those damaged items also ascertained;

and,

(b) what quantum loss on the destroyed and damage items ought the court to award the insured, and whether such loss be allowed on a 'reinstatement' or 'indemnity' basis.

Whether On Indemnity Or Reinstatement Basis – The Law

With the exception of life or personal accident policies, most other policies of insurance are indemnity policies; that is, policies which obligate the insurer only to make good the actual losses suffered by the insured, which is in fact proved. See *Meacock v. Bryant & Co.* [1942] 2 All ER 661 and see *West Wake Price & Co. v. Ching* [1956] 3 All ER 821 at 825, [1957]. The insured cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. See *Curtis & Sons v. Mathew* [1918] as reported in 35 TLR 189, CA. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss. See *Richard Aubrey Film Productions Ltd. v. Graham* [1960] 2 Lloyd's Rep 101. The contract being

one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more (see *Castellain v. Preston* [1883] 11 QBD 380 at 386, CA) whatever may have been his estimate of what his loss would likely be, and whatever the premiums he may have paid calculated on the basis of that estimate, unless he had taken out what is termed as valued or agreed value policy. See *Elcock v. Thomson* [1949] 2 KB 755, [1949] 2 All ER 381. In this connection, I need do no more than to quote from the speech of Megaw LJ in the Court of Appeal in *Leppard v. Excess Insu. Co. Ltd.* [1979] 1 WLR 512, where he said, at p. 518:

> Ever since the decision of this court in *Castellain v. Preston* [1883] 11 QBD 380, the general principle has been beyond dispute. Indeed, I think it was beyond dispute long before *Castellain v. Preston.* The insured may recover his actual loss, subject, of course, to any provision in the policy as to the maximum amount recoverable. The insured may not recover more than his actual loss. As it was put by Brett LJ in *Castellain v. Preston,* at p. 386:
>
> > In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

When a claim is made under an indemnity policy, questions pertaining to measurement of loss and/or the possibility of reinstatement must be resolved without undue delay to enable the parties to reach an agreement as to the amount to be paid under such a policy. Under an ordinary indemnity policy the insurer undertakes to indemnify the insured for a loss caused by the insured event. In relation to insurance on property, another option is for the insurer to offer to reinstate or replace the property concerned.

By the form of policy in general use, (as in the instant case, vide the Reinstatement Value Clause Endorsement number FA 552817-M) the insurers reserve to themselves the option of reinstating the property instead of making payment in money. This option is reserved for the insurers' benefit, and it is for them, within reasonable time, to elect whether to reinstate; the assured is not entitled to require them to reinstate. Nor may he prevent them from

reinstating if they elect to do so. An election for or against reinstatement is final once it is made, and cannot afterwards be withdrawn. No formal election is necessary; an election by conduct is sufficient, provided that the conduct is clear and unequivocal. The insurers will be taken to have elected against reinstatement and in favour of a payment in money if the negotiations for a settlement have been conducted by the insurers throughout on the footing that the loss is to be made good by a payment in money, or if they have proceeded to arbitration for the purpose of ascertaining the amount to be paid under the policy. If the insurers do not elect to reinstate, their obligation to make good the loss by a payment in money continues, but if they do elect, the obligation ceases and the contract becomes a contract to reinstate. See *Halsbury's Laws Of England* – 4th Edn Reissue Vol 25 p. 352. The fact that an insurer has opted to reinstate a damaged property does not supplant the insurer's primary obligation to the insured which is to indemnify him for his loss. Hence, if for some reason, the reinstatement does not adequately indemnify the insured for his loss, then subject to the terms of the policy, the insurer is required to pay the insured the difference.

"Reinstatement" means the restoration of property affected by a fire to the condition in which it was before the fire; in the case of a total loss, by rebuilding the building or replacing the goods by their equivalent, as the case may be, and in the case of a partial loss by repairing the damage. Once an insurer has elected to reinstate a building, then the insurer must proceed with the reinstatement even though in the process they discover that it is more difficult and more expensive than they had anticipated.

The Facts

The plaintiffs had originally submitted their claim on a reinstatement basis. After submission of their claim, the plaintiffs asked for interim payment. The defendants replied to say that they were waiting for their adjusters' preliminary report and advice whether they should make an interim payment. On 14 December 1985, the defendants notified the plaintiffs' previous solicitors that they had been advised by their adjusters not to make any interim payment. The plaintiffs' previous solicitors then wrote two further letters to the defendants on 26 September 1986 and 20 October 1986 asking for the matter to be resolved. On 2 December 1986, more than one year after the fire, the defendants through their solicitors wrote and notified for the first time that the defendants were repudiating the plaintiffs' claim. As the plaintiffs had no financial resources to carry out reinstatement of the damaged building and the other damaged and destroyed property within one year of the fire, they were then compelled to base their claim on indemnity basis. In this courts's view, by the defendants' conduct in failing to respond or to exercise their option

during the vital period of claim, and indeed, by waiting for the period of 1 year to expire before repudiating the policy under condition 19, the defendants had clearly shown that they had no intention to reinstate the damaged property. In any event, both parties have now agreed (vide counsels' submission) that the basis for quantifying the instant claim is on an indemnity basis.

Re: Plant And Machinery

i) Items In The Risk Premises At Time Of Fire

The plaintiffs claimed that there were 54 items of plant and machinery in the risk premises when the fire occurred. The 54 items are as particularised and segregated under two categories as per appendix I and appendix II (contained in pp. 20-28) of the adjuster's (M/s Thomas Howell Kiewit (M) Sdn. Bhd) Final Report, tendered by the defendants as exh D24. Whereas, the defendants conceded only 52 of the 54 said items as they had contended that items 9 and 26 of appendix I were not in the risk premises upon inspection after the fire.

* *[Editor's note: appendix I and appendix II in this judgment have been removed with the court's consent to facilitate publication.]*

Despite expenditure in space and time, it is not only necessary for ease of reference, but indeed essential, especially in a fire-claim such as the instant claim, to set out in detail each of the myriad items of plant and machinery involved with all their esoteric nomenclature. The contents of appendix I pertaining to total loss items, and appendix II covering damaged items compiled by the defendants' adjusters, with their recommendations and remarks are here set out; and in order to facilitate comparison I have also taken the liberty to juxtapose against each of the 54 items the plaintiffs' current quantum-claim, by adding a 9th (last) column to appendix I and II.

There is no reason for this court to doubt the plaintiffs' contention on this aspect of the case, and I find, after careful consideration of the evidence before me, that there were 54 items (ie, inclusive of item 27, which does not come under plant and machinery) of plant and machinery located in the risk premises when the fire occurred. My reasons are as follows:

(a) The said adjusters' claim is contrary to their own Final Report in which they had said (in the second paragraph of p. 18 of exh. D24): "The first six items (No. 1-6 of appendix I) were installed below the staircase on the ground floor and were extensively devastated by direct fire, heat and extinguishment water. The balance of 24 items (No. 7-30 of appendix I) were installed on the first floor had been totally damaged in the fire." and;

(b) The engineer of M/s C. Melchers & Co. who carried out, in the risk premises, a careful inspection of the plant and machinery that were destroyed or damaged to enable him to put up his quotations, had (among the list of items quoted) identified the presence of item 9 of appendix I, being "1 unit electrolysis gold plating machine" (per item 12 of p. 2 of the Melchers' Report (P22)), as well as the presence of item 26 of appendix I, being "1 unit of stainless steel alcohol filler" (per item 14 of p. 3 of exh P22). The report of C. Melchers & Co. dated 25 March 1986 was adduced as P22. And, this court accepts PW1's explanation that the engineer from M/s C Melchers one Mr Wong Woo who visited the risk premises immediately after the fire could not be called to testify as he could not be located despite genuine attempts vide letter to M/s C. Melchers dated 28 February 1996 (exh P40) and their reply dated 15 March 1996 (exh P41). In any event, the defendants did not raise any objections to the tender of P22 in evidence.

(ii) Items Destroyed And Items Damaged

To determine this question it is perhaps of considerable assistence to also look at the extent of physical damage and destruction caused to the risk premises by the fire. To quote from the report dated 24 October 1985 (under number Makmal (Penang) 13963/85) of the Government Chemist, at Penang, Mr Tan Cheng Yean (vide exh P17) which reported thus:

> Accompanied by Sgn. Major Koay, I visited a fire scene at the Wong Wah Seng factory in Jalan Kg. Jawa, Bayan Baru, Penang. I was requested to determine the seat and the cause of the fire.
>
> The Wong Wah Seng factory building was a double-storey concrete building with a corrugated roof. The whole of the first floor of the building was razed by the fire except for a store at the rear, right side. (see sketch 1). I found that the central part of the first floor was more intensely damaged than the sides. The metal frames along the walls in the central part were more badly bent and twisted than those at the right and left sides of the first floor (see photographs 1 and 2). The roof over the central part of the factory building was destroyed. Here the roof beams were found to be bent (see photograph 3). I also examined the stores at the right side of the first floor (see sketch 1). The contents of the front store were burnt but the rear store was only slightly damaged by the fire. Some of the plastic containers in the rear store had melted at their upper parts. The roof of this rear store was intact but the ceiling beams were charred.

> On the ground floor of the factory building, I found that only the area around the staircase was affected by the fire. The handrail of the staircase was charred. The wall beside the staircase was covered with a black deposit. The ceiling beams above the staircase were charred. Some furniture at the foot of the staircase were partly burnt. The other parts of the ground floor were not burnt (see photograph 4).
>
> I searched among the debris in the intensely burnt area on the first floor and did not detect any inflammable liquid hydrocarbons.
>
> I am of the opinion that the fire had started in the central part of the first floor of the factory building. Owing to the intensive damage to the roof, I am of the opinion that the possibility of an electric fault cannot be ruled out.

The Melchers' Report (exh P22) stated that out of the 40 items of the plant and machinery, 36 items were identified as destroyed and 4 items damaged in the risk premises. Whereas, the defendants' adjusters M/s Thomas Howell, claimed in exh D24 that only 28 items were destroyed and that 24 items of the plant and machinery could be repaired. To particularise, exh P22 states that in appendix II of exh D24, only items 1, 4, 5, and 21 were damaged and repairable, but items 2, 3, 6, 8, 9, 10, 11, 12, 17 and 19 were destroyed and irrepairable. And, since then the plaintiffs have also acknowledged that the remaining items 7, 13, 14, 15, 16, 18, 20, 22, 23 and 24 of the appendix were also repairable.

I do recognise that in D24, the appraisers had reported that the 24 items of plant, machinery and electrical equipment listed in appendix II consisted of items housed in the ground floor of the risk premises, whilst the most extensive devastation wrought by the fire occurred at the first floor and the fire came down to the staircase area on the ground floor. Nevertheless, after considering all the available evidence before me and the circumstances as during and immediately following the fire, I am inclined to find in favour of and accept the plaintiffs' contention that items 2, 3, 6, 8, 9, 10, 11, 12, 17 and 19 in appendix II of exh D24 were destroyed beyond repair. My reasons are as follows:

(a) My careful study of exh D24, the 131 post-fire photographs (exh D32) taken at the risk premises immediately after the fire, in conjunction with a critical examination of the chemist report (exh P17), have persuaded me to take the view that the extensive nature of the fire which destroyed substantial portion of the first floor and the roof and the metal frames along the first floor of the central part of the factory, would in all probability have also destroyed those items housed in the ground floor, due to the intense heat and the deluge of water used during the

extinguishment process and the subsequent rain water. Indeed, the extensive nature of the fire detailed in P17 was furher confirmed in the adjuster's final report, at p. 6 (in D24) where, he said:

> Fed by the softboard material and the wooden frame of the ceiling, the plywood planks on the metal racks and some of the inflammable stocks (like hair spray) the fire soon spread to encompass the entire first floor area. The combustible packing material, labels and old books and documents aided the fire in its spread. **The heat generated by the fire was extremely intense and it caused all the portal frames to buckle and resulted in the entire roof crashing down.** During the process, the guard said that he heard some explosions, no doubt due to the canned inflammable gas being burned. Falling debris managed to find their way to the ground floor from the staircase and the shaft of the hoist and resulted in igniting the stocks stored in the vicinity. **The fire on the ground floor spread to the other combustible materials and caused fairly extensive damage thereat.** (emphasis added).

(b) Even had the disputed items of plant and machinery been damaged but not destroyed, yet, as the result of the reprehensible conduct of the defendants during the crucial salvageable period affecting the life of the plant and machinery, such items became, in all probability, irrepairable, due to the extensive rusting process caused by the extinguishment and (incessant) rain water coupled with being left unattended, unrepaired and unserviced for a substantial period of time. Though it is recognised that clauses such as Special Provision no. 2 of the Reinstatement Value Clause in the Policy in the instant case specifically obligated upon the insured to replace or reinstate the property destroyed or damaged, nonetheless, in my considered view, in fairness to the insured, a reciprocal obligation is also placed upon the insurer to notify the insured within a reasonable time as to whether the insured is required to repair or reinstate the said properties. Speaking generally, it is logically incumbent upon an insurer so to notify, for the plain reason that, it is only upon the insured's failure to repair or reinstate after such notification, that the insurer may exercise his vested right to elect the option in the instant case (in the instant case under cl. 14 of the conditions of Policy) of either reinstating the damaged properties himself or alternatively settling the loss with the insured on an indemnity basis. In this regard, regretably the defendants' total lack of any reasonable response during the material and crucial period has to be taken adversely against them. I find PW1's answer in cross-examination quite pertinent when he said: "We asked for interim payment **to reinstate the building, plant and machinery and to operate the factory** but they never offered, never replied, never suggested or advised, but one day after the expiry of the one year period they slammed cl. 19 of the policy on

us – to say that it was time barred." He also wrote a letter dated 25 October 1985 (DBD 28) which pleaded in the following imploring terms:

> Under advice of M/s Thomas Howell we did our best and have reinstated our tenant, M/s Anka Tackle to use a major part of the space rented to them at a short time of approximately ten days. Getting the Council's approval for them to move in to work, we also had to take off the metal cladding from the roof and also the roof itself so that our tenant and employees coming to work will be safe. We had to pay for this work done and also the other heavy expenses. The other expenses we have to bear are staff salaries, electricity bills, water bills, payments to suppliers and we have collection problems as we are unable to supply goods to our customers.
>
> We thought of renting another premise so that we can start production but we could not move our machineries out and also all our machineries are affected by the fire or the intensive heat and also the water and chemicals. That is why we did not rent an alternative premise. But if you give us an interim payment, we would be able to carry on work by renting a site and purchase new machinery and raw materials for production. We are not insured on consequential loss but this misfortune is costly to us as we have explained above and usually our sales is at its best at the last quarter of the year. We have sent in a claim of approximately $1,600,000 and we would appreciate an immediate payment from your company as to help us pay our heavy expenses. We sincerely hope that you will take this into immediate consideration." And, he further added that despite this appeal, "we were not given any interim payment – there was no suggested figure and no suggested mode of settlement."

The defendants were all the more culpable considering that even though the plaintiffs' preliminary (first) claim was submitted on 23 October 1985 (containing the PW1's own estimates based on the company auditors' reports) – as reconfirmed by their letter dated 25 October 1985 (exh. P20) – and the revised claim was resubmitted on 24 April 1986 (vide exh. 23, based on independent quotations obtained by plaintiffs upon advice of the defendants' adjusters), and despite several letters from the plaintiffs and their former solicitors, yet it was only on 2 December 1986, that the plaintiffs' solicitors received a letter from the defendants' solicitors to state that they are repudiating liability on the claim entirely; on the grounds that "the claim was not the subject of pending action or arbitration within the 12 months period after the fire" (see cl. 19 of policy) and that the plaintiffs had "made claims under the policy which are false and fraudulent."

Basis For Quantification

There is no dispute between the parties that the claim is grounded on an indemnity rather than reinstatement basis. Thus, in accordance with the principles enunciated in *Leppard v. Excess Insurance Co. Ltd.* [1979] 1 WLR 512 at p. 518 to 520), the loss recoverable on plant and machinery destroyed would not be based on the replacement value (with new machinery) but the market value of a similar property at the time of fire bearing in mind the age, characteristics and condition of the insured item. In my judgement, such market value, which is evaluated and pegged in the light of the then prevailing market conditions, and which more closely approximate the plaintiffs' real loss, would be a fair and just approach for this court to take. Whereas, in respect of the damaged items that could be repaired, the loss would be the reasonable cost of repairs and not the market value.

Nonetheless, in practical terms the difficulty presented here is to determine what is the basis and what criteria – which is most appropriate to the justice of the case – one should adopt in order to arrive at the market value of the items destroyed. One cannot simply snatch from the air an arbitary percentage figure without any basis. Also, the problem is further compounded by the fact that the claim here pertains to manufacturing plant and machinery which, unlike, for example, road vehicles, are highly susceptible to price appreciation from year to year at "new unit" prices.

In my view, even though it ought to be borne in mind that at the time of fire most of the plant and machinery had already been in use for a few years, yet nevertheless it is material to also note that the defendants' own adjusters have conceded that such "plant and machinery were subject to price increments through-out the years from 1979 to 1985". This is what they had to report (at p. 18 of their Final Report in D24):

> As C. Melchers & Co's quotation is not reliable to be used as a basis to determine the replacement value of the plant, machinery and contents concerned, we adopted the Insured's alleged purchase value of the individual items as per column 1 of appendix I as a basis to work out our amount (adjustment) to be recommended for insurers' consideration. From our trade enquiries, we confirmed that the insured's purchase values' were rather reasonably stated when compared with the prices stated in C. Melchers & Co's quotation. *Due to price increments (appreciation of prices) of the plant, machinery and contents throughout the years from 1979 to 1985, we would advise that it would be justifiable to take into consideration 15% mark-up appreciation factor for the plant, machinery and contents concerned.* (emphasis added)

This court is keenly aware of and recognizes the theoretical principle in commerce and economics that all items of commerce including plant, machinery and tools attract progressive depreciation in their value in the course of time. However, when one has to consider the question of recoverable value in insurance-loss case, it is settled that such value recoverable on each item claimed is the market value of a similar property, at the time of loss, bearing the same age, characteristics and condition of the insured item. Applying this approach on the question of market value, it is noted in the plaintiffs' favour that their current claim was based on the quotations from M/s C. Melchers & Co., an agency house dealing with the buying and selling of plant equiptment and machinery of similar design to the damaged and destroyed items of property. In my considered view, though the Melchers' quotations were based on "replacement by new units", yet, unless the defendants had obtained which they could have done – similar quotations from their own expert sources, it would be quite unfair and impermissible for the defendants to totally brush aside the Melchers' quotation as "not reliable" basis for the determination of the market value of the relevant items as at the time of fire. The defendants had instead adopted the plaintiffs' preliminary purchase values on the individual items (as shown in column 3 of appendix I and II in exh D 24) knowing full well that such purchase values submitted by PW1 were mere tentative figures based on his own estimates, which he was obliged to tender to the defendants, very soon after the fire.

Besides, the testimony of DW3 before me was far from satisfactory. He said: "I was the adjuster. I did a listing of the machinery in my own handwriting but I am now unable to show the court the list mentioned in p. 15 of Final report which stated: 'we were able to compile a detailed list of all the items housed on the ground floor'. I do not have the list with me now. The extent of damage in the machinery is not noted in P18 though it is stated in p. 15 of my final report (in D24). P19 is in the handwriting of DW2. P19 is an inventory of the machinery located in the top floor. P18 largely comprises list of machinery on the ground floor. My list of machinery which I had taken on the site is now not available. I do not know whether P18 and P19 were prepared on the same day, but the inspection in P18 and P19 were carried out by two separate adjusters." In short, he could not produce any documentary evidence to support what he said at the trial. He said that his recommendation of RM215,056.75 for the totally damaged items of machinery was made after he had counter-checked with certain sources. Under cross-examination, he said he could not remember from which suppliers he had made the enquiries. Neither did he secure any estimates or any quotation from any potential suppliers. This court further observes that even in respect of his comments on a few items as "grossly overstated" he could not show any supporting

documents or quotations from sources similar to M/s C. Melchers for comparison purposes. Thus, it is regrettable for me while ruminating on his evidence, to have to make the observation that DW3's desultory evidence in the witness stand is matched only by his gross incompetence in the performance of his duties as an adjuster – no doubt, of uncertain qualification for the job. It would appear that the problem was not his fading memory in the passage of time but rather, there was nothing that he did (which he ought to have done) to remember. I do not believe him. Consequently, this court is left with no alternative but to accord due weight to the prices listed in exh P22, in it evaluation of loss.

In stark contrast, the evidence proffered by the defendants in respect of the market prices of the items destroyed (bearing in mind their age, characteristics and condition as at the date of fire) were based on the substantially scaled down amounts on the price quotations from M/s C. Melchers & Co. (exh P22) for new replacement units. Taking the major items for example: the new Compressor, Semi-automatic Aerosol Filling, Vacuuming and Crimpling Machine, Shrink Tunnel, Electrolysis Gold Plating Machine, Fully Automatic Liquid Sachet Filling Machine, Fully Automatic Powder Sachet Filling Machine and Variable Speed Stirrer with Stainless Steel Container (Swiss made) were individually priced at RM4,200, DM26,500 FOB, DM24,500 FOB, DM8,500, US$37,500, US$38,000 and Swiss Francs 18,500 by M/s C.Melchers respectively (largely in foreign currencies), whereas the considerably trimmed down market prices currently claimed by the plaintiffs on each of the said items in *pari seriatim* are RM3,000, RM30,000, RM16,000, RM6,000, RM45,000, RM45,000 and RM10,000 respectively. Further, a critical examination and meticulous study of the figures in appendix I and II of D24, in conjunction with the individual amounts in the plaintiffs' current claim (in column 9) would reveal that, in reality, the quantum dispute involving amounts of material difference, mainly pertain to items 7, 9, 14, 17, 26, 28 and 29 of appendix I and items 1, 2, 3, 5, 8, 9, 10, 17, 19 and 21 of appendix II. Of these items, items 9 and 26 carried "nil recommendations" due to the adjuster's view that there was no proof that the machines "had been in the premises". And, items 2, 3, 8, 9, 10, 17 and 19, bore substantial quantum differential, due to the plaintiffs' contention that these were items destroyed rather then damaged (as detailed in Sch I of their list, which this court has found in their favour). Besides, it may be of some relevance to observe that as for items 1, 2, 3, 8, 10, 11, 12, 13, 23 and 25 of appendix II, the amounts submitted in the plaintiffs' current claim are indeed less than the corresponding amounts recommended by the defendants' adjusters for settlement. Furthermore, the plaintiffs' current claim under this heading is not that substantially above the tentative purchase values on the individual items in the plaintiffs' first claim

– which, even the defendants' adjusters had opined as "rather reasonably stated". In the event, upon the available evidence, I find the quantum of loss now claimed by the plaintiffs on the individual destroyed items, to be reasonable and ought to be allowed.

As for the items that could be repaired, I have held that the claimable loss would be the reasonable cost of repairs. DW3 said that he based his recommendation on the damaged items of machinery from trade enquiries, but he could not remember from whom he had made the enquiries. Also, no repair cost-estimate was forthcoming from the defendants. In the circumstances, I find the estimated cost of repairs on each of the damaged items as detailed by M/s C. Melchers & Co in exh P22, to be demonstrably reasonable, and I hold that such estimate ought to constitute the loss recoverable by the plaintiffs. On this aspect of the claim, the defendants had also argued that the amount realised by the plaintiffs in the sale of the repairable machinery should be deducted from plaintiffs' claim for plant and machinery. It is my judgement that since the plaintiffs' claim for the repairable items of machinery are only for the cost of repairs and not the market value, the amount so realised by the plaintiffs for such items of machinery should not be deducted from the claim.

In the event, I award to the plaintiffs the aggregate sum of RM333,600 (as claimed) in respect of the destroyed and damaged plant, machinery and tools.

Re: Stock

Still on quantum, I shall finally turn to the plaintiffs' claim for stock loss in the sum of RM661,437.05. According to DW2, whilst DW3 covered "the machinery, electrical equiptment, tools, moulds and office machinery" he (DW2) dealt with the taking of stock-loss and the extent of damage to the risk premises. In support of their claim on stock, the plaintiffs produced all the invoices pertaining thereto, as found in three voluminous files marked as exhibit 'P31A, B and C' (admitted by consent pursuant to s. 73A(2) but subject to s. 73A(6) of the Evidence Act 1950), M/s Wong Wah Seng's stock balance, the invoices of disposal of stock from the M/s Wong Wah Seng to the plaintiffs and the computer print-out on stock as at 15 August 1985.

There is no dispute that the stock in the first floor of the risk premises was totally destroyed in the fire, and that only RM16,861.92 of the stock on the ground floor could be salvaged (see Sch A of exh D24). DW2 had also admitted that: "physical evidence of light fittings were there when we made the inspections – and if it formed part of the coverage it would be included." And, in respect of the stock items, he acknowledged that "there would

normally be 5% to 10% deductions in value for obsolescence." There was also no question that the defendants' adjusters did not carry out adjustment of the value of the stock despite the fact that all the relevant documents in support thereof were given by the plaintiffs to them. On this, DW2 acknowledged that: "In the course of my investigations carried out I was given: i) The stock balance for September 1984 in respect of Wong Wah Seng (PBD 139-143); ii) The three bundles of invoices contained in exhs P31A, B and C; iii) The invoices of sales of stock from Wong Wah Seng to Wong Cheong Kong (PBD 144 – 158); iv) The computer print-out as at 15 August 1985 (exh P28) – on stock control; v) The computer print-out on stock control as at 30 September 1985 (exh P29); vi) The Delivery Orders for period 2 September 1985 to 7 September 1985 (exh P30); vii) The audited account of Wong Wah Seng for the period ended 30 September 1985 (PBD 42-54 – exh P12); and, viii) The stock records of Wong Wah Seng's purchases for year 1984 to 1985 (DBD 41)." Yet, in the final report (see p. 38 of exh D24) his advice to his client was: "In view of the reasons mentioned above, we were in no position to report on quantum under this item of the policy. If insurers decide to evaluate the loss based on available information and figures, the basis could take such guideline shown below. The claim amount of $661,437.05 as per computer print outs could be detailed as follows:

Raw material, work-in-progress and	
finished goods.	$527,000.85
Lightings.	$134,436.20

	$661,437.05
	=========

On the defendants' contention that the electrical lightings and fittings valued at RM134,436.20 should not be allowed as stock because the plaintiff were not involved in the electrical lightings and fittings business, I find that the electrical lightings and fittings were in fact insured by the policy under "electrical equiptment ... **and all other contents**" in Items No. 2 of policy Endorsement No. FA/26267/85. Furthermore, considering that the defendants had themselves issued this endorsement, and it was so issued after their prior and proper verification of the property then to be insured, if there is at all any ambiguity in this endorsement, the *contra proferentum* rule should apply against the defendants.

In the event, I would allow the plaintiffs' claim for stock-loss in the amount of RM661,437.05 (as claimed), less the sum of RM16,861.92 (being the value of the stock on the ground floor which could be salvaged) with a further

deduction of 10% of the balance amount for obsolescence. This would produce the net sum of RM580,117.62 awarded herein to the plaintiffs on stock-loss. Thus, adding this net figure to sum of RM333,600 awarded on plant machinery and tools together with the three earlier agreed quantum figures, to wit, RM95,000 (on building, furniture and fixtures), RM24,000 (on loss of rental from tenant) and RM20,000 (on removal of debris), would make a grand total sum of RM1,052,717.62, which quantum this court now awards to the plaintiffs on their claim under the fire policy.

With this award, the question that now arises for determination is: whether or not the plaintiffs should be awarded interest on the aggregate award of RM1,052,717.62 above. The question of interest would have to be carefully and ponderously deliberated, as it involve giving a percentage figure calculated upon a large sum over a long period of time, which (if allowed) could double the quantum of loss awarded herein.

The Courts are empowered to award interest on debts and damages under s. 11 of the Civil Law Act 1956 which provides that:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:-
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

A policy does not bear interest as a matter of course (see *Webster v. British Empire Mutual Life Assurance Co* [1880] 15 Ch D 169, CA (life insurance) per James LJ at 174, overruling *Crossley v. City of Glasgow Life Assurance Co* [1876] 4 Ch D 421 (life insurance) from the time when the policy money becomes payable. It is only awarded, if the Court thinks fit, as damages for the wrongful detention of money which ought to have been paid (see *Webster v. British Empire Mutual Life Assurance Co (Supra)*). Interest may, however, be awarded (see *Burt and Harvey Ltd and Alchemy Ltd. v. Vulcan Boiler and General Insurance Co Ltd* [1966] 1 Lloyd's Rep 354) from the date of the loss, (see *Montreal Assurance Co v. M'Gillivray* [1857] 2 LCJ 221) or a later date (see *Macbeth & Co. Ltd. v. Maritime Insurance Co. Ltd.* [1908] 24 TLR

559, *Burts and Harvey Ltd. and Alchemy Ltd v. Vulcan Boiler and General Insurance Co. Ltd. (No. 2)* [1966] 1 Lloyd's Rep 354, *Re Waterhouse's Policy* [1937] Ch 415, [1937] 2 All ER 91, and *Forney v. Dominion Insurance Co Ltd* [1969] Lloyd's Rep. 502). And, normally, where strict proof is insisted on by the insurance company and the assured proves his case, interest on the amount claimed up to the date of judgment will be awarded. On the question of whether interests should be awarded, the conduct of the defendants would be of material consideration in the exercise of the courts' discretion under s. 11 of the Civil Law Act 1956.

Conduct Of The Defendants

It is appropriate to bear in mind that in this case, the conduct of the defendants has been most unfortunate, cynical and not to their credit. The main thrust of their defence revolved around condition 13 pertaining to fraudulant claims and quantum, yet they have thrown into the works (and later abandoned) issues in regard to insurability and breach of warranty. And on the arbitration cl. 18, the plaintiffs were even taken to the Supreme Court some years ago. The defendants appear to have deliberately waited for the one year period to expire before repudiating liability for the first time (without any prior hint of intended repudiation), and then invoking condition 19 of the policy regarding limitation. Indeed, it is noted that the order (confirmed by the Supreme Court) of Dzaiddin J (as he then was) made on 11 May 1987 had *inter alia* restrained the defendants from pleading limitation under condition 19 of the policy as a defence to the plaintiffs' claim. Furthermore, the defendants had not made any offer of settlement, even on an *ex gratia* basis in response to the plaintiffs' several plea for interim payment, despite the fact that the adjusters had reported that the plaintiffs' purchase values estimated in the first claim "were rather reasonably stated", and that "we traced no breach of any applicable policy warranty."

There was admission by DW1 that though the plaintiffs had, soon after the fire, vide their letter dated 14 November 1985 requested for interim payment of RM500,000 the defendants only replied that they were "waiting for a preliminary report from the adjusters." Indeed, the unfortunate history of the plaintiffs' claim could be gleaned from the evidence of PW1, who testified thus: "I did, after receiving PBD 20 instruct my lawyers to take action. My lawyers did file, for extension of time to refer the matter to arbitration and for appointment of an arbitrator, on 23 January 1987, the same day this action was filed against the defendants. The application was heard on 11 May 1987 and an order was given in terms of our application. The order of Dzaiddin J was for extension of two months from date of the order to appoint an arbitrator, with a further order that Raja Aziz Addruse be appointed the sole

arbitrator in the arbitration. In that order the defendants were also restrained from pleading limitation under condition 19 of the policy. The defendant company appealed against this judgment. The appeal was heard by Supreme Court on 23 February 1988. The appeal was dismissed and I was granted a further extension of two months from 23 February 1988 for appointment of the arbitrator. Following that the parties did go before Raja Aziz Addruse for arbitration. Then, at the request of the defendants the arbitration was discontinued and we came back to this court to continue with this action." It is noteworthy that the same adjusters (appointed by the defendants) had not made any positive or substantiated comment anywhere in the interim or final report that fraud may have been committed by the plaintiffs. At the outset of the current trial (*de novo*, at the defendants' request) and even as it progressed, several issues raised in the defence – including the serious allegation that the same typewriter was utilized to type out the two disputed invoices and the other invoices – were abandoned. The shedding of those myriad multifocal issues catalogued in their defence may be likened to a banyan tree that loses its leaves in the course of time. This surely, is not an attractive way to behave. Indeed, it has now been made manifest to this court through the tedious process of this trial *de novo*, that the plaintiffs had, in their properly insured and "securely assured" claim on the policy, been made to travel through an exceedingly difficult path laid with sharp stones (certainly not the cobblestones suitable for the practice of reflexology) – nay a travel through an inferno no less searing than the heat that gutted the risk premises.

For all the reasons adumbrated above, surely, in my judgment, the plaintiff's request for the judgment sum to bear 8% interest from the date of the fire, is a modest and reasonable request in a fierce situation. Such interest, in justice, ought to be allowed, and accordingly I award the plaintiffs eight percent (8%) interest on the judgment sum calculated with effect from the date of loss, that is from 11 September 1985 – rather than from the date of writ – until payment or full satisfaction. Considering the circumstances of and factual matrix found in this case, I can see no reason why the defendants should not pay interest on the amount awarded herein at a rate which bears some relation to the commercial rates of interest which have been in operation during the period between the end of 1985 the present time. See *Burts and Harvey Ltd and Alchemy Ltd (supra)*. The defendants must also pay the plaintiffs' cost of this action, and I so order.

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